LIBRARY
SUPREME COURT, U. S.

FILED
SEP 30 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 548

SNOHOMISH COUNTY, a municipal corporation,
Appellant,

v.

SEATTLE DISPOSAL COMPANY, and THE TULALIP TRIBES, a federal corporation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF RESPONDENTS IN OPPOSITION

ORVILLE H. MILLS for
CHADWICK, CHADWICK & MILLS, and
ANDERSON & HUNTER
Attorneys for Respondents Seattle Disposal Company

601 First National Bank Building
Everett, Washington 98201

METROPOLITAN PRESS — SEATTLE, WASH.

SUBJECT INDEX

	Page
References To The Record	2
Opinions Below	2
Jurisdiction	2
Constitutions, Treaties, Regulations and Statutes Involved	2
Questions Presented	4
Additional Statement Of The Case	5
Argument	5
A. The Lands in Question Are "Lands Held in Trust By The United States" Or Are "Subject to a Restriction Against Alienation Imposed By the United States."	5
B. The County Has No Jurisdiction to Require a Conditional Use Permit on Indian Lands.	7
1. The zoning ordinance if construed to be applicable, is an "encumbrance" against Indian land.	7
2. An attempt to impose the zoning ordinance upon Indian lands is an attempt to regulate such lands inconsistent with federal treaty, agreement, statute or regulation.	7
3. The Tulalip Ordinance controls.	9
C. The Rights of the Tulalip Tribes Apply as Well to a Non-Indian Disposal Company	10
Argument In Answer To Appellant	11
A. Introduction	11
B. Whether Allotment No. 91 Is Held in Trust	11
C. Question of Denial of Equal Protection	12
Conclusion	13

TABLE OF AUTHORITIES

Table of Cases

	Page
Bailess v. Paukune, 344 U.S. 171, 97 L.Ed. 197, 73 S.Ct. 198 (1952)	12
Hauser v. Arness, 44 Wn.2d 358, 267 P.2d 691 (1954)	7
Hebb v. Severson, 32 Wn.2d 159, 201 P.2d 156 (1948)	7
Sperry v. Florida, 373 U.S. 379, 10 L.Ed.2d 428 (1963)	11
U.S. v. County of Allegheny, 322 U.S. 174, 88 L.Ed. 1209 (1944)	11
Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685, 14 L.Ed.2d 165 (1965)	10

Constitutional Provisions

United States Constitution, Art. I, Sec. 8, Cl. 3 ..... 4, 10, 12

Statutes

R.C.W. 36.70.010	2, 9
R.C.W. 37.12.060	4, 5-6, 7
.070	7, 9
25 U.S.C. Sec. 403a	6, 8
Sec. 403a-2	6
Sec. 403b	2-3, 8
Sec. 415	3-4, 8
28 U.S.C. Sec. 1360	4, 5

Other Authority

25 C.F.R. Sec. 131.9	4, 8
Sec. 131.9(b)	8, 10
58 I.D. 52 (1942)	9

IN THE

Supreme Court of the United States

October Term, 1967

No. 548

SNOHOMISH COUNTY, a municipal corporation,
Appellant,

v.

SEATTLE DISPOSAL COMPANY, and THE TULALIP TRIBES,
a federal corporation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF RESPONDENTS

IN OPPOSITION

TO: THE HONORABLE CHIEF JUSTICE and ASSOCIATE JUSTICES of the UNITED STATES SUPREME COURT:

Respondents, SEATTLE DISPOSAL COMPANY and THE TULALIP TRIBES, a federal corporation, pray that the Writ of Certiorari prayed for by appellant (petitioner) be denied and show the court as follows:

REFERENCES TO THE RECORD

All references to the record from the Supreme Court for the State of Washington are as follows:

App. Pet. .....Appellant's Petition
R. ST. .....Statement of Facts

OPINIONS BELOW

Respondents accept appellant's statement.

JURISDICTION

Respondents accept appellant's statement of jurisdiction.

CONSTITUTIONS, TREATIES, REGULATIONS AND STATUTES INVOLVED

Respondents accept appellant's recital of statutes, but would add the following:

R.C.W. 36.70.010 which states:

> "The purpose and intent of this chapter is to provide the authority for, and the procedures to be followed in, guiding and regulating the physical development of a county or region through correlating both public and private projects and coordinating their execution with respect to all subject matters utilized in developing and servicing land, all to the end of assuring the highest standards of environment for living, and the operation of commerce, industry, agriculture and recreation, and assuring maximum economies and conserving the highest degree of public health, safety, morals and welfare."

25 U.S.C. Sec. 403b, which states:

"Notwithstanding any other provisions of law, with the consent in writing of the individual Indian, association of Indians, or Indian tribe concerned, any restricted Indian lands situated within the State of Washington may be leased for religious, educational, recreational, business or public purposes, including, but not limited to, airports, experimental station, stockyards, warehouses, and grain elevators, for periods not to exceed twenty-five years under such rules and regulations as the Secretary of the Interior may prescribe; *Provided*, That nothing in this section or section 403c of this title shall be deemed to authorize such leases for the exploitation of any natural resources."

25 U.S.C. Sec. 415 which states:

"Any restricted Indian lands, whether tribally or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary. All leases so granted shall be for a term of not to exceed twenty-five years, except leases of land on the Agua Caliente (Palm Springs) Reservation, the Dania Reservation, the Southern Ute Reservation, and the Navajo Reservation which may be for a term of not to exceed ninety-nine years, and except leases of land for grazing purposes which may be for a term of not to exceed ten years. Leases for public, religious, educational, recreational, residential or business purposes (except leases the initial term of which extends for more than seventy-four years) with the consent of both parties may include provisions their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regu-

lations as may be prescribed by the Secretary of the Interior."

U.S. Const., Art. I, Sec. 8, Cl. 3, which states:

"The Congress shall have power to regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes."

25 C.F.R. Sec. 131.9, which states, in part:

"(a) Tribes * * * may negotiate on forms approved by the Secretary or his duly authorized representative and subject to the approval of the Secretary or his authorized representative, leases or permits with respect to tribal lands, at not less than the appraised value. * * * (b) The constitutions, by-laws, charters, ordinances and resolutions, adopted by tribes organized pursuant to the Indian Reorganization Act of June 18, 1934 * * * shall govern where inconsistent with regulations in this part."

QUESTIONS PRESENTED

Respondents believe that the questions presented can be summarized as follows:

1. Are lands purchased by The Tulalip Tribes, a federal corporation, subject to restrictions against alienation imposed by the United States;

2. Can such lands be voluntarily placed in trust to the United States;

3. If such lands are subject to restrictions against alienation or are held in trust by the United States, is zoning action by a municipal corporation of the State of Washington:

a. "An encumbrance" within the prohibition of 28 U.S.C. Sec. 1360 and R.C.W. 37.12.060;

b. Inconsistent with any federal treaty, agreement or statute as provided by 28 U.S.C. Sec. 1360; and,

4. If a municipal corporation cannot control the Indian's use of their land, can it control such use indirectly by controlling its use by a lessee?

Appellant's question concerning a passive trust (App. Pet. 3, question 2) was never presented to the Washington Supreme Court and should not be considered in this matter.

ADDITIONAL STATEMENT OF THE CASE

Respondents accept appellant's statement of the case, but would add:

1. The lease between Seattle Disposal Co. and The Tulalip Tribes was pursuant to an ordinance passed by The Tribes, pursuant to Article VI, Sec. 1(k) of its charter, which gave the Board of Directors the power to safeguard and promote the peace, safety, morals and general welfare of the tribe (R. St. 21).

ARGUMENT

A. The Lands in Question Are "Lands Held in Trust By The United States" Or Are "Subject to a Restriction Against Alienation Imposed By the United States."

R.C.W. 37.12.060, based upon 28 U.S.C.A. Sec. 1360 (note), is the principal limitation upon Washington jurisdiction and states, in part, as follows:

> "Nothing • • • shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights and tide lands, be-

> longing to any Indian or any Indian tribe, band or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon this State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein * * *."

For the above restrictions to apply, Indian lands must either be "held in trust by the United States" or be "subject to a restriction against alienation imposed by the United States."

Allotment 91 qualifies, as these lands were acquired by the United States in trust for The Tulalip Tribes (St. 20). Allotment 92 qualifies as these lands were taken in the name of The Tulalip Tribes, a federal corporation, and by virtue of federal law they are subject to a limitation on alienation. 25 U.S.C.A. Sec. 403a provides in part, as follows:

> "Notwithstanding any other provision of law, any Indian lands on the * * * Tulalip Indian Reservations in the State of Washington, may be leased by the Indians *with the approval of the Secretary of Interior* and upon such terms and conditions *as he may prescribe*, for a term not exceeding 25 years. . . ." (Emphasis added)

In addition, Sec. 403a-2 provides for the sale of Tulalip owned lands *"with the consent of the Secretary of the Interior*, on such terms and conditions as the Tulalip Board of Directors may prescribe." (Emphasis added)

Both statutes, which pertain specifically to Tulalip owned lands, provide that a lease or sale may be made

only with the consent of the Secretary of Interior, thus they are subject to a restriction against alienation.

B. The County Has No Jurisdiction to Require a Conditional Use Permit on Indian Lands

By virtue of R.C.W. 37.12.060, the State and its subdivision have no right to (a) "encumber" Indian restricted lands, or (b) regulate the use of such lands inconsistent with any federal treaty, agreement, statute or regulation. R.C.W. 37.12.070 provides that any Indian ordinance, not inconsistent with State law, is controlling.

1. The zoning ordinance if construed to be applicable, is an "encumbrance" against Indian land.

An encumbrance is any "burden upon land depreciative of its value . . ., which, though adverse to the interest of the land owner, does [not] conflict with his conveyance of the land in fee." *Hebb v. Severson*, 32 Wn. 2d 159, 201 P.2d 156 (1948).

Clearly, a restriction against the use of such land in any legitimate way is an "encumbrance" as the basic purpose of a zoning law is to limit the use of the property (*Hauser v. Arness*, 44 Wn.2d 358, 365, 267 P.2d 691 (1954)), thereby decreasing its use and its value even though it does not inhibit the owner from conveying the land in fee. So the Washington Supreme Court held in our case.

2. An attempt to impose the zoning ordinance upon Indian lands is an attempt to regulate such lands inconsistent with federal treaty, agreement, statute or regulation.

The effect of the county's action is to regulate the use

of Indian lands for legitimate purposes, which is in conflict with a number of federal laws.

Indian Tribes are given the following powers over their lands:

a. 25 U.S.C. Sec. 403b allows any restrictive Indian lands within the State of Washington to be leased for "religious, educational, recreational, business or public purposes," with the approval of the Secretary of the Interior;

b. 25 U.S.C. Sec. 403a authorizes leasing of Tulalip land, with the approval of the Secretary of Interior;

c. 25 U.S.C. Sec. 415 authorizes leasing of Indian land, with the approval of the Secretary of Interior, for public, religious, educational, recreational, residential, or business purposes; and,

d. 25 C.F.R. Sec. 131.9 provides, in part, as follows:

> "(a) Tribes • • • May negotiate on forms approved by the Secretary or his duly authorized representative and subject to the approval of the Secretary or his authorized representatives, leases or permits with respect to tribal lands, at not less than the appraised value. • • • *The* constitutions, by-laws, charters, *ordinances* and resolutions, *adopted by tribes* organized pursuant to the Indian Reorganization Act of June 18, 1934 • • • *shall govern where inconsistent with regulations in this part.*" (Emphasis added)

The Tulalip Tribe Ordinance No. 29 provides specifically that these lands could be used as a garbage fill. Therefore, in accordance with 25 C.F.R. Sec. 131.9(b) this ordinance would govern.

Respondent's contention is recognized not only by the

Washington Supreme Court but by the Department of Interior. 58 I.D. 52 (1942). The department held that land acquired by the United States in trust for Indians is, in effect, land of the United States, and zoning ordinances do not reach such lands. The decision is set out in full as Appendix "A" of respondent's brief in the Washington Supreme Court, which is a part of the record herein.

By federal statutes and regulations, the Indians, with the consent of the Secretary of Interior, are authorized to lease their lands for various purposes. If the county can say, the lands are not to be leased for a specific purpose, viz., garbage fill purposes, then the county is regulating the use of such land, contrary to federal law.

3. *The Tulalip Ordinance controls.*

On July 7, 1964, pursuant to the Tulalip charter, the Board of Directors of the tribe passed Ordinance No. 29, under its power to promote the tribes' health, safety and general welfare (R. St. following p. 23). This ordinance authorized a sanitary garbage land fill on allotments 91 and 92. In accordance with R.C.W. 37.12.070 (assuming the county has jurisdiction), such an ordinance is controlling unless it is inconsistent with any applicable civil law of Washington.

The applicable Washington civil law does not prohibit sanitary garbage fills, as such, but includes such matters only under the general terms of "public health, safety, morals and welfare." R.C.W. 36.70.010, *et seq.* Thus, Washington law does not make illegal the action set out in Ordinance No. 29. It is only the action of Snohomish County which appears to conflict with the Tulalip ordi-

nance. Even the Snohomish County ordinance does not *prohibit* sanitary land fills and is therefore not in conflict with the Indian ordinance.

Therefore, since the tribal ordinance is not inconsistent with any applicable law of Washington, it is to be given full force and effect in the determination of civil causes of action.

In addition, the ordinance controls because of 25 C.F.R. Sec. 131.9(b), *supra*. That regulation states that tribal ordinances will contol if contrary to other regulations.

C. The Rights of the Tulalip Tribes Apply as Well to a Non-Indian Disposal Company

U.S. Const. Art. I Sec. 8, Cl. 3 states, in part:

> "Congress shall have power . . . to regulate commerce . . . with the Indian Tribes."

This is precisely what our case involves. Snohomish County is attempting to control commerce with the Tulalip Tribe by attempting to zone their lands and to impose zoning ordinances on non-Indians who deal with the Tulalips. This constitutes an attempt by the county to "regulate commerce . . . with the Indian Tribes" which is reserved to the United States.

The most recent case dealing with this point is *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685, 14 L.Ed.2d 165 (1965), in which this court held that the State of Arizona could not impose its sales tax upon a trader with the Indians, insofar as such tax was imposed on gross sales to the Indians. The court held that this field is controlled by the United States, and the state's attempt to tax the trader was inconsistent with federal

statutes. By inference the court held that the Arizona tax statute was an additional "burden" on commerce with the Indians.

In a number of cases which deal with attempted state control over third parties who are covered by federal enactments or who are dealing with the United States, the U.S. Supreme Court has upheld the supremacy of federal law. See for example: *Sperry v. Florida*, 373 U.S. 379, 10 L.Ed.2d 428 (1963), which held the state could not control patent attorneys, licensed by the United States, as such state action was a restraint on federal power; and *U.S. v. County of Allegheny*, 322 U.S. 174, 88 L.Ed. 1209 (1944), where the state attempted to tax a government contractor on federal property being used by him, and the court held this to be an indirect control of and tax on the federal property.

Since the county is by law prohibited from imposing restraints on Indian lands or encumbering them, it cannot impose such restraints indirectly by stopping non-Indians from dealing with the tribes or by frustrating Indian commerce with non-Indians by restraining the non-Indian.

ARGUMENT IN ANSWER TO APPELLANT

A. Introduction

Most of respondent's argument in answer to appellant is covered under its previous argument; however, the following points are pertinent.

B. Whether Allotment No. 91 Is Held in Trust

Appellant contends that the trust imposed on Allotment No. 91 is passive and dry and is thus not a trust at all.

First, this point was not brought before the Washington Supreme Court.

Second, even if the trust were to fail, the lands are still lands owned by an Indian tribe and subject to a restraint against alienation imposed by the United States.

Third, appellant's case of *Bailess v. Paukune*, 344 U.S. 171, 97 L.Ed. 197, 73 S.Ct. 198 (1952), is inapplicable as the beneficiary of the trust, in that case, was a non-Indian, who was not subject to the trustee duties of the United States and "there remains only a ministerial act for the trustee to perform, namely, the issuance of a fee patent."

C. Question of Denial of Equal Protection

Appellant argues that holding Tribal Ordinance No. 29 pre-empts the county zoning ordinance is a denial of equal protection.

By the Constitution of the United States Indians are given a position different from other citizens, as Congress has the power "to regulate commerce . . . with the Indian Tribes." U.S. Const., Art. I, Sec. 8, Cl. 3. Such "denial of equal protection," if it can be denominated as such, is likewise inapplicable where the State of Washington has been given no jurisdiction over a class of persons, as stated by the Washington Supreme Court in its decision.

Finally, appellant says that the Indians are denied equal protection. If so, it is their own voluntary act which does so, as they themselves accepted the lease and passed the ordinance.

CONCLUSION

The decision of the Washington Supreme Court was correct and should be sustained. A proper analysis of the problem can be categorized as follows:

1. The lands in question are either held by the United States in trust for The Tulalip Tribe or are subject to limitations against alienation imposed by the United States. As such, the state may not impose encumbrances nor restraints upon such lands.

2. The zoning of those lands, if held to be applicable, constitutes an encumbrance as it reduces the utility and thereby the value. In addition, such zoning is a restraint upon the use contrary to the statutory right of the Indians to lease their lands for business or public purposes, inconsistent with federal law.

3. The Tulalip ordinance is controlling, as it does not conflict with state law, and, further, is pursuant to federal statutory authority.

4. The prohibition against the county encumbering and restraining the land applies as well to Seattle Disposal Co., otherwise, the county could do indirectly what it cannot do directly.

Based upon the aforesaid, the Petition for Writ of Certiorari should be denied, with costs to the respondents.

Respectfully submitted,

ORVILLE H. MILLS for
CHADWICK, CHADWICK & MILLS, and
ANDERSON & HUNTER
Attorneys for Respondents
Seattle Disposal Company